

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

WANGS ALLIANCE CORPORATION

and

Case No. 29-CA-27027

STEPHEN P. GILMORE, AN INDIVIDUAL

*Linda Harris Crovella, Esq.*, Brooklyn, NY  
for the General Counsel  
*Steven S. Goodman and Christopher M. Valentino, Esqs.*,  
(*Jackson Lewis LLP*), Melville, NY  
for the Respondent  
*David Abrams, Esq.*, New York, NY  
for the Charging Party

DECISION

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge. Based upon a charge filed on June 28, 2005,<sup>1</sup> in Case No. 29-CA-27027, by Stephen P. Gilmore, an individual (herein Gilmore), a complaint was issued against Wangs Alliance Corporation (herein Respondent) on October 31.

The complaint alleges that on January 11, Respondent violated Section 8(a)(1) of the Act by discharging Gilmore because he concertedly discussed Respondent's policies regarding wages, hours and other terms and conditions of employment with Respondent's other employees, or because Respondent believed that he had done so. Respondent filed an answer in which it denied the material allegations of the Complaint. A hearing in this matter was held before me on March 14, 2006 in Brooklyn, New York.

Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a domestic corporation, having a place of business located at 615 South Street, Garden City, New York, is engaged in the business of manufacturing and wholesale distribution of lighting. During the past year, Respondent purchased and received

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<sup>1</sup> All dates herein are in 2005, unless otherwise specified.

goods and services valued in excess of \$50,000 directly from entities located outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## 5 II. Alleged Unfair Labor Practices

### Respondent's Technical Support Department and Managerial Structure

Respondent<sup>2</sup> is a lighting fixture manufacturer which, during relevant times, operated  
10 business locations in Garden City, New York, City of Industry, California and Dallas, Texas. There are approximately 85 employees at its Garden City location, which is the facility involved herein. Technical Support Supervisor Eric Silverman oversees all operations in the Technical Support Department.<sup>3</sup> Through 2004, the manager of the Technical Support Department was Sean Tham.<sup>4</sup> Commencing in January 2005, Silverman began reporting directly to John Camp,  
15 who at the time was Respondent's Product Manager.<sup>5</sup> Shelley Wang (Wang), Respondent's General Manager, is the second highest ranking official of the company. She reports directly to Respondent's President/CEO, Tony Wang, who is her father.

### Gilmore's Employment History

20 Gilmore was employed as a technical support specialist for Respondent from September 8, 2004, through January 11, 2005. His duties consisted primarily of handling product inquiries from customers, distributors and suppliers. He was also expected to attend trade shows to provide technical assistance to Respondent's sales team and prepare specification sheets for  
25 Respondent's products. At the time Gilmore was hired, he had been earning \$26.00 per hour in his previous job; however, he testified that on a periodic basis, his salary was reduced by 10% and then restored. These recurrent temporary reductions in salary were one factor which led him to seek other employment. Notes taken during Gilmore's employment interview indicate that he made this known to his prospective employer.<sup>6</sup> He commenced working for Respondent  
30 earning an annual salary of \$60,000 per year. Although his regular work hours were 8:00 a.m. to 5:00 p.m., it was understood that Gilmore would be expected to travel and attend several trade shows per year which lasted from three to four days each. Gilmore shared an office with Silverman, who was his immediate superior, as well as two other employees named Warren Steele and Dave Lombardo.

35 Sometime in about November, Silverman spoke with the technical support employees about an adjustment in their work hours. The office located in California was scheduled to close, and the technical support staff was asked to stay late one evening per week to field calls from that section of the country. Gilmore was approached by Steele and Lombardo, who told him that  
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<sup>2</sup> Respondent is also known as W.A.C. Lighting.

<sup>3</sup> Silverman did not testify in this proceeding.

45 <sup>4</sup> The transcript denotes the spelling of this individual's name as "Tam." It appears from documentation in the record that the correct spelling is "Tham."

<sup>5</sup> Beginning in October 2003, Camp worked as a consultant for Respondent. On January 3, 2005, Camp began regular employment as its Product Manager. Thereafter, in September 2005, Camp was promoted to National Sales Manager. He reports directly to Wang.

50 <sup>6</sup> Gilmore was interviewed by Wang, Silverman and Human Resources Generalist Agnes Lee. Both Wang and Lee took notes during this interview.

they were going to refuse to stay late.<sup>7</sup> Gilmore testified that didn't mind doing so because the adjustment in his work hours allowed him to miss rush hour traffic, shorten his commute and put his children on the school bus in the morning. Gilmore typically stayed late one or two evenings per week to handle calls, and denied that he ever refused this assignment. As noted above,  
 5 Silverman did not testify in this proceeding.

In addition to his assigned duties, at Silverman's suggestion, Gilmore attended school two evenings per week to enhance his technical abilities. Gilmore was also assigned work on certain projects. For example, Tham asked Gilmore to develop a display case that sales  
 10 personnel could take with them to demonstrate new transformers. Gilmore was also asked to work on what is referred to in the record as the "dimmable ballast" project. Respondent wished to develop a commercial market for its florescent fixtures. In order to make these desirable to customers, the fixtures required additional features such as battery backup and dimmability. Gilmore was asked to find suitable dimmers and backup power sources that would work with the  
 15 fixtures as manufactured, so that they would not require modification. Gilmore called supply vendors and obtained specifications and samples. He ascertained which components would fit inside the fixtures and then contacted manufacturers to negotiate a purchase price. Another component of this project involved the preparation of a worksheet which demonstrated which dimmers and battery backups would work with each fixture. The dimmable ballast project was  
 20 initially assigned to Gilmore sometime in either late October or early November, and he was originally provided with an open time frame for its completion. Sometime in December, Tham informed Gilmore that he wanted the project completed by the end of that month.

Gilmore testified that one Friday afternoon in December, Camp, still in consultant status, told Gilmore that that he wanted a worksheet for the dimmable ballast project completed by  
 25 Monday to prepare for a meeting with CEO Tony Wang. Gilmore worked on the project over the weekend, devoting eight hours to its completion. He testified that he then e-mailed the completed worksheet to Camp and to his office computer, as well. At the hearing, Camp testified that he had asked for a spreadsheet and not a worksheet (the distinction is discussed  
 30 below), that he not given Gilmore any specific deadline for its completion and that he never received the completed project from Gilmore.

During the course of Gilmore's employment he was evaluated on two occasions. The first was a 30 day probationary review conducted by Silverman. The review was generally  
 35 favorable, but Silverman did refer to one incident where he had asked Gilmore to make a change to something he was working on. According to Gilmore, he replied with a joke which Silverman interpreted as an insubordinate comment. At his evaluation, Gilmore apologized and explained that he had meant his comment to be a joke, and Silverman accepted his explanation.

A subsequent written review was conducted in November 2004. It was noted, among  
 40 other things, that Gilmore had strong technical aptitude and very good analytical skills, that he was willing to pitch in and lead a project, that he met deadlines, was trustworthy and took initiative to start projects on his own.

There were certain less-than-favorable comments as well. One concerned a  
 45 "miscommunication about availability to travel to trade shows. Can not accommodate extended

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<sup>7</sup> Gilmore initially testified that he told Steele and Lombardo that, as a new employee, he was not  
 50 going to refuse the assignment. He later acknowledged that he may have only thought this to himself.

stays due to family responsibilities. An issue we will need to work around in the future.”<sup>8</sup> Another comment noted that Gilmore, “[n]eeds coaching in handling phone conflicts.” In a section entitled “personal conduct” it was noted: “Needs to be aware not to present a conflict to a supervisor in public. IE: it’s OK to question my direction or judgment, but it’s not acceptable to refuse the request. We cleared this up.” According to Gilmore, this reference pertained to the misunderstood joke which had been mentioned by Silverman in his prior evaluation.

Gilmore was found to have met and/or exceeded expectations in this review, and he received a raise.<sup>9</sup> The evaluation was signed by Silverman and Tham.

#### Employee Discussions of Respondent’s Wage and Hour Policies

Sometime in December 2004, a coworker named Sherry Holmes came into Gilmore’s office and stated that Wang had announced that if an employee was short hours, those hours would be taken out of an employee’s vacation time. In the event vacation time was not sufficient to cover the absence, employees would be docked pay. According to Gilmore, other staff members were present in the office, which he termed a “hub” where employees came to voice their concerns. Gilmore testified that numerous individuals articulated complaints about this policy. In addition, at about this time Wang had distributed a survey to employees, which could be returned either by e-mail or hard copy. There was one open-ended question and, according to Gilmore, a number of workers had expressed their unhappiness with this new time policy. Gilmore testified that he completed his survey and submitted it anonymously. Wang offered no testimony regarding this survey or the comments she received from employees.

On or about December 28, Gilmore’s home boiler malfunctioned, and he was five hours late to work. On January 5, Respondent’s Human Resources Generalist Brandi Lasch,<sup>10</sup> approached Gilmore and advised him that his hours for the pay period were short and if he wanted to compensate for those hours with work he had done at home he would have to complete a make-up time form and get approval from his supervisor.<sup>11</sup> Gilmore completed the

<sup>8</sup> According to Gilmore, when the trade show schedule was posted both the number of shows he was assigned to attend, as well as their duration, were more than he had been led to believe when hired. He complained about these assignments to Silverman, who made an adjustment to the number of shows he was to attend. As it happened, Gilmore was discharged prior to attending any of the trade shows to which he had been assigned.

<sup>9</sup> Wang testified that raises were given out once per year and that Gilmore did not receive a raise during the course of his employment. However, the record demonstrates that Gilmore was hired at an annual salary of \$60,000 and Camp testified that when he reviewed Gilmore’s personnel file prior to his discharge, he noticed that Gilmore was earning \$65,000 per year, more than others in his job classification. Accordingly, I credit Gilmore’s testimony that he received a raise.

<sup>10</sup> In late November or early December, Lee left, and Lasch assumed her position.

<sup>11</sup> Respondent pays its employees twice per month. Documentation regarding leave is due the day prior to the end of the relevant pay period. Wang testified that “make-up time” is an informal phrase which reflects an exception that supervisors are authorized to make for adjustments in employee hours, which allows them to count work done outside of regular work hours against personal leave. Wang further testified that an exempt (salaried) employee would not have pay docked from their paycheck unless they missed an entire day of work. There is no reference to this policy in the company’s personnel manual. Gilmore testified that, before Holmes’ announcement, it was his understanding that as a salaried employee, he would not be compensated for working overtime and, conversely, he would not have his pay reduced if his hours were short. Wang offered no testimony regarding any asserted change in policy at this point in time.

form, seeking to recoup five of the eight hours he previously spent working at home on the dimmable ballast worksheet to offset his absence on December 28.<sup>12</sup> Gilmore testified that although Silverman had been in the facility earlier in the day, he was not present at the time. During the course of that day Lasch approached him on several occasions, requesting the approved form, but Silverman was not to be found, so he went to see Camp who just a few days earlier had become Product Manager.

#### Events Leading to Gilmore's Discharge

Gilmore testified that he told Camp that Lasch had approached him several times, and was badgering him to have the make-up time form signed, that he could not find Silverman, that he really didn't agree with the policy and was upset by the fact that he would be having money taken out of his check. On cross-examination, Gilmore acknowledged that he told Camp that if he had known that Respondent had policies like this, he would not have left his prior job. Gilmore acknowledges that, during this discussion, his voice was raised and he was "speaking loudly in John's direction." He denied using any profanity, however.

Camp's office is situated next to Wang's and the door was open at the time. Camp asked Gilmore to keep his voice down, and made a gesture indicating that Gilmore should lower his voice. Camp took the form from Gilmore and stated that he would have Silverman sign it, and if he didn't, Camp would sign it himself. Camp's account of this meeting and of subsequent encounters differs significantly from Gilmore's, and is discussed below.

Apparently, Lasch had made similar requests of other employees as well. Gilmore testified that as he proceeded back to his office, he saw that other employees had the form. He also passed a group of employees, including Holmes, who were discussing the employer's time policies, and was invited to join in the discussion. He continued to his office where another discussion was underway at Lombardo's desk regarding the same subject. Gilmore admitted that he did not engage in any discussion of Respondent's make-up time policy with other employees, but he noted that other employees were as irritated about it as he was.

Gilmore stated that Camp never again spoke with him about the make-up time form, and he never learned whether it had been approved or disapproved.<sup>13</sup> The form, which was entered into evidence by the General Counsel, has two signatures on it. Gilmore was able to identify Silverman's but was uncertain about the other.<sup>14</sup> I find, based upon a comparison of this signature with one found on Gilmore's termination notice, that it is Camp's. I additionally note that Camp did not deny that the make-up time form contained his signature.

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<sup>12</sup> It appears that Gilmore worked on this project on December 18. He also claimed one hour of make-up time on December 17 to offset one hour of regular time missed on December 20, but there was no testimony regarding this at the hearing.

<sup>13</sup> Gilmore's testimony about whether he was ever docked pay for this incident is uncertain. Gilmore also testified that his check had been short on a prior occasion, which occurred at about the time Holmes had informed him about Respondent's new policy. He asked Silverman to look into the matter, but never received a response from him. Respondent contends that Gilmore's pay was not, in fact, reduced on any occasion because, as a salaried employee, his pay would not have been withheld unless he missed a full day of work. Neither party produced salary statements, payroll records or other documents which would have shed light on this issue.

<sup>14</sup> I also note that the signature attributed to Silverman is consistent with the one which appears on Gilmore's personnel evaluation.

Later that day, Gilmore returned to Camp's office and apologized for his conduct. He asserts that on the following day, January 6, he was summoned to Camp's office and told that Wang had overheard his displeasure and was upset with him for raising his voice. Camp opined that, "it really doesn't look good for you." Gilmore testified that the subject of make-up time was mentioned. According to Gilmore, Camp told him to go back to work, and he would try to take care of it. Later that day, Gilmore, Camp and some others coworkers went to lunch. According to Gilmore, throughout the balance of the week, and the following Monday, there was no mention of the prior incident in Camp's office.

At the hearing, both Camp and Wang offered a significantly different account of what transpired during the period between January 5 up to and including Gilmore's discharge on January 11. According to Camp, when Gilmore arrived at his office on January 5, he was visibly upset. He stated that he had to have a make-up time form submitted to Human Resources by the end of the day. Camp asked what a make-up time form was, and Gilmore showed it to him, stating that Silverman had refused to sign it and that this was "bullshit." He asked Camp to sign the form. Camp testified that he disputed whether Gilmore had legitimately spent five hours on the worksheet, and said that if he submitted it for five hours, he would look like a jackass because the project should take only 30 to 45 minutes. At this point, Gilmore became visibly upset and said, "it's fucking bullshit. . . please sign it. I need to get this thing signed off on, you know, I – this is just bullshit. You know, please can you just sign it so I can take this down to Human Resources." Camp relied that he could not authorize five hours, when he knew the assignment did not take five hours to do. At this point, Gilmore became more upset and said, "You know, this is just – this is fucked up John. I just need you to sign it. This is fucked up." Gilmore became "louder and louder" and Camp stood up and told Gilmore, "Enough is enough. Do not yell at me." At his point, Gilmore calmed down and Camp said that he would try to get him at least two hours of makeup time. Apparently the door to Camp's office remained open during this incident, and Camp testified that there was a group of at least three people in the hallway, looking in, but that he did not recognize anyone as he had just started working there. Camp testified that the encounter upset him because he was in an executive position, being challenged right off the bat, and that he felt that Gilmore was taking advantage of him by claiming five hours for a project which should have taken far less time.<sup>15</sup> Camp denied telling Gilmore that, if Silverman would not sign the form, he would, or that he would attempt to smooth things over. Camp did not explain, however, why his signature appears on Gilmore's request. In addition, no testimony was offered by Respondent as to how Silverman's signature came to be on the document.

Camp testified that he went down to Human Resources, met with Lasch and said he was trying to obtain two hours of makeup time for Gilmore.<sup>16</sup> Lasch stated that she would check with Wang. Camp then spoke with Wang. Camp told her that there had been a major blowup in his

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<sup>15</sup> In the transcript the word "worksheet" appears to be used to refer to two separate projects. According to Camp, he had requested that Gilmore prepare a spreadsheet, which would list the vendor of the product and its specifications. Camp maintained that his request was open-ended and he was expecting it to be completed before the end of January, when he was scheduled to make a trip to China. Both Camp and Respondent's counsel also referred to this document as a "worksheet." In addition to the spreadsheet described above, Gilmore was apparently also assigned to prepare a "worksheet" which would contain detailed, specific information regarding the physical characteristics of the product. The preparation of this worksheet would require Gilmore to take actual samples and measure them to see if they would be compatible with the existing fixtures, among other things.

<sup>16</sup> Lasch, who no longer works for Respondent, did not testify.

office, and he could not believe that he was being challenged in such a fashion on his third day of work. He stated that Gilmore was trying to claim five hours of make-up time, and he was trying to see if he could get two, but that he was not happy with the situation. Camp expressed surprise that Gilmore could get so upset and fly off the handle in such a fashion. Wang stated that Gilmore had engaged in major insubordination and perhaps he should be terminated. Camp  
 5 replied that he was not comfortable with that,<sup>17</sup> and suggested that Gilmore be issued a written warning. Nevertheless, Camp stated repeatedly that he was uncomfortable with the entire situation, and asked if he could review Gilmore's personnel file, which was retrieved from Human Resources. Camp expressed surprise at the fact that Gilmore had been with the  
 10 company only a few months and that he was earning \$65,000 per year, more than other employees in his job title. He was troubled about the miscommunication about Gilmore's availability to travel to trade shows. Camp testified that he was "particularly surprised" to learn of the "blowup" Gilmore had with Silverman, as reflected in the "personal conduct" portion of the personnel evaluation.<sup>18</sup> In concluding their meeting, Wang stated that she would discuss the  
 15 issue of Gilmore's make-up time with Lasch, and look into his workplace conduct further. She also requested that Camp prepare a document summarizing the incident he had with Gilmore earlier in the day so that a warning could be prepared. Both Wang and Camp testified that at this time they had no knowledge of, or any discussion of Gilmore's supposed communications with other employees regarding Respondent's policies.

20 According to Camp, when Gilmore came to see him later that day to apologize for his conduct, "we had a brief chat and I just explained to him that that's unacceptable and you know, something I don't tolerate as a manager." Gilmore said it wouldn't happen again and asked whether he would be terminated, and Camp stated that he did not know.

25 The following day, January 6, Gilmore stopped by Camp's office and asked whether he had heard anything from Lasch. Camp replied that as soon as he heard something, he would let Gilmore know. Camp offered no testimony to rebut Gilmore's statement that the two had eaten lunch together that day.

30 On Friday, January 7, Lasch told Camp that Wang had not approved Gilmore's request for make-up time. Camp summoned Gilmore to his office and advised him of the decision. Gilmore became upset, and said, "you know, John, this -- this—this just sucks, you know, it's not right. This is just -- this is fucked up." Gilmore started getting "loud" again and Camp told him  
 35 that "we are not going there again" and cut him off quickly. As before, Camp's door was open and he saw people in the hallway looking in.

40 Camp testified that this incident led him to have serious concerns about Gilmore's anger, given the fact that he had experienced two "blowups" and there had been one with Silverman as well. Camp decided that, when he had an opportunity to speak with Wang, he would recommend that Gilmore be terminated. However, he did not do so until the following Monday, January 10. Camp testified that he approached Wang during a break and explained to her that he had not had an opportunity to see her since the second incident with Gilmore had occurred, and that based upon the recurrence of Gilmore's conduct, he felt that this was not  
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<sup>17</sup> Camp testified that inasmuch as it was his first week in a managerial position, he was concerned about how a discharge would affect his relationships with other employees.

<sup>18</sup> The reference that Camp is alluding to was the notation that Gilmore, "[n]eeds to be aware not to present a conflict to a supervisor in public. IE: It's OK to question my direction or judgment, but it's not  
 50 acceptable to refuse the request. We cleared this up."

someone who should be a member of the team. Wang concurred with Camp's recommendation for termination. Camp testified that, at the time he made the decision to terminate Gilmore, he knew nothing about any discussions he may have had with other employees regarding company policies.

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Wang testified that on January 5 she was in her office and heard loud shouting from Camp's office and she stuck her head out to see what the ruckus was. She saw a few employees who were "poking their heads out, wide-eyed." Wang testified that, at the time, she saw three people and was able to identify one: Kit Tsang, the supervisor for order entry. Camp later stopped by her office to explain that Gilmore was very upset and frustrated that both Silverman and Camp had refused to authorize his request for make-up time, that Gilmore had been shouting and cursing at him, and that he thought he might have some anger issues which might affect the workplace. He was also concerned about being challenged in the workplace as a new manager. Wang replied that such behavior and especially that type of language was not allowed in Respondent's "family oriented" workplace. Since Gilmore was a relatively new employee, there was no reason why he should not be terminated for such conduct. According to Wang, Camp was concerned about how a termination might affect his level of respect with his subordinates, and he was more comfortable with a write up. Gilmore's personnel file was reviewed and Camp wondered whether this type of behavior might have come up in Gilmore's prior employment. Wang told Camp that she would look into the issue of make-up time and investigate the incident with Silverman which was reflected in Gilmore's personnel evaluation. She asked Camp to provide details regarding the incident in his office to assist her in preparing the warning. Wang testified that, after consultation with Lasch, a decision was made to deny Gilmore's request for make-up time, because he had not received pre-approval and because it was felt that the amount of time claimed for the work Gilmore had performed was excessive.

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Wang sent a fax to Gilmore's prior employer requesting information regarding Gilmore's dates of employment, reason for termination and salary history. The response Wang received stated, among other things, that Gilmore's salary history had ranged from \$12.50 to \$23.40 per hour, which was a discrepancy from what Gilmore had claimed to be earning when interviewed for the position, which was \$26.00 per hour.<sup>19</sup>

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Wang testified that on January 6 she spoke with Silverman in the office he shared with Gilmore and the other members of the technical support team, but could not recall if anyone else was present. She asked him about the comments that were made on Gilmore's evaluation, and Silverman made reference to an incidence of insubordination regarding a specification sheet and the issue about whether Gilmore would be willing to attend trade shows. According to Wang, Silverman additionally mentioned that, he had heard about what had happened with Camp and that after meeting with him the prior day, Gilmore had stormed back to the office, claiming that the denial of make-up time was "bullshit." Wang did not offer any other specific testimony about what Silverman may have told her on this occasion.

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Wang prepared what was eventually to become Gilmore's termination notice on the morning of Monday, January 10. At the time, she left the ultimate disposition undetermined, but completed the other sections of the report, including the sections entitled "Warning History" and "Current Circumstances," which are discussed below. Wang prepared this document based

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<sup>19</sup> As Counsel for the General Counsel notes, the hourly wage of \$23.40 reported by Gilmore's former employer reflects a reduction of \$2.60 per hour, or 10%, from what he claimed to be earning, which is consistent with the information Gilmore provided during his employment interview.

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upon her discussions with Camp and Silverman as well as her review of Gilmore's personnel file, including his performance evaluation, and the information she had received from Gilmore's prior employer. Although she had asked Camp to prepare a written summary of the January 5 incident, he had not done so. Wang testified that before she wrote the notice, she had not personally observed Gilmore speaking with co-workers about Respondent's policies. The sole basis for her reference to such conduct was the information which had been provided to her by Silverman.

Wang met with Camp on January 10, after she had prepared the notice, and was informed about the incident which occurred when Camp advised Gilmore that his application had been denied. Camp told her he was "sure that there was no place for a person like that in our office" and that he would like to terminate his employment. Wang then completed the warning, checking the box for termination, and adding, "After considering the above violations and unsatisfactory performance, we have decided to terminate Steve's employment with WAC Lighting." Wang made no further revisions to the document she had prepared, explaining that as there had been sufficient reason to terminate Gilmore based upon the first incident, there was no need to add additional information regarding the second.

Camp testified that the first opportunity he had to review the termination notice prepared by Wang was on January 11. Prior to that date, he was unaware of any conversations Gilmore may have had about company policies with any employees, had not discussed this issue with anyone, and that any such discussions did not factor into his determination to terminate Gilmore's employment.

Gilmore is Discharged

On Tuesday, January 11, Gilmore was unable to log into his computer. Camp escorted Gilmore to his office. Gilmore testified that, on the way there, Camp said that "Shelley got her way and it looks like that's it for you." Wang was waiting in Camp's office. Gilmore was presented with a notice of termination. According to Gilmore, he asked Wang why he was being discharged, and she replied that it was for causing dissension in the company and that he was not working out. Under cross-examination by Counsel for Respondent, Gilmore acknowledged that in the pre-trial affidavit he provided to the Board on July 20, he did not state that Wang told him that he was being discharged for causing dissension in the company. When asked why that was the case, Gilmore stated that he remembered it afterwards, playing the scene through his head, explaining that being terminated from his employment was an embarrassing moment for him. He also stated that his head was in a "state of flux" at the time he was being discharged.

Camp testified that he spoke on behalf of the Respondent at this meeting. He told Gilmore that, "unfortunately at this time, we're going to be terminating you. I think you know what the reasons are. The insubordination wouldn't be tolerated and at that time, I said, you know, we might as well just cut to the chase. Why don't you please read the employee warning and sign off at that time." Neither Camp nor Wang specifically denied Gilmore's testimony that he was told that he was being discharged for, among other things, "causing dissension in the company."

The termination notice presented to Gilmore lists a number of perceived deficiencies in his work performance. The section entitled "Prior Warnings," states as follows:

October: When asked to work till 7PM to cover the west coast needs once a week He refused. E.S. spoke with Steve about the expectations of the position He was hired for includes the flexibility to occasionally work longer shifts,

weekends for trade shows, and travel as an exempt employee.

November E.S. spoke with Steve about refusing to make a change in a worksheet he was working on. This type of insubordination will not be tolerated.

January 3 J.C. spoke with Steve about the commitment he expects. It is not appropriate to complain about answering tech phone calls that is part of his job. Complaint was based upon an unfounded charge that Warren answers less calls than Steve does.

In another section entitled "Current Circumstances" Wang wrote:

On January 5, 2005, Steve failed to comply with company policies that require that he seek approval for work and time that qualified for make up time. While demanding from his manager, John Camp, that the time he spent working on the project at home without supervision be counted, he was insubordinate and disturbed the workplace by yelling and shouting his displeasure with the policy. After the discussion, Steve proceeded to make his way around the office discussing his issues with various employees around the office furthering a negative environment and wasting valuable time.

Furthermore, he has not been performing to the level of expectations for which he was hired. His work ethic and attitude are not acceptable from an exempt employee and the compensation levels that he is receiving. Upon investigation with his prior employer, it was also found that he misrepresented his salary history on this application. The application shows that his last rate was \$26/hr. His prior employer confirms it at \$23.40/hr.

Gilmore testified that when he saw the termination notice, he protested that it was false. Wang asked him to sign it, stating that his signature did not mean that he concurred with what was written, but was just an acknowledgment that he was being terminated.

#### Gilmore's Application for Unemployment Benefits

Subsequent to his termination, Gilmore filed a claim with the New York State Department of Labor (DOL) for unemployment insurance benefits. After his application was rejected, he requested a hearing and retained attorney David Abrams. Prior to the hearing, Abrams reviewed Gilmore's file, and requested a copy of certain material from the office receptionist, including form TCC-413.2.<sup>20</sup> This is a memorandum prepared on March 16, which purports to reflect an investigatory interview conducted by James R. Davies with Mark Sabow, a Human Resources Generalist employed by Respondent. The interview is reported as follows:

The claimant worked for us from about 9/8/2004 until 1/11/2005 as a tech support person. The claimant's last day was 1/11/2005. The claimant was discharged from employment on 1/11/2005 because the claimant went around the office, to some of the other employees, on 1/5/2005, discussing his dissatisfaction with the company's policy about not being granted authorization to make up time at home.

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<sup>20</sup> Abrams testified that, in preparation for hearing, each party may review the file and request copies of documents contained therein.

If the claimant did not go around the office discussing his dissatisfaction with the company's policy about needing to be approved to work the make-up time, the claimant would not have been discharged on 1/11/2005.<sup>21</sup>

5 A hearing was subsequently held on April 29 before Administrative Law Judge Richard Ward (the unemployment hearing). At the inception of the hearing, Judge Ward made the following statement:

10 The unemployment office disqualified you, Mr. Gilmore, from receiving benefits. That determination was made effective January 11, 2005. It says you lost your employment to misconduct. It says you were discharged from employment with Wangs Alliance Corp. For causing dissension within the company. Although you state that you did not speak to other employees about your opinion of the company's policy, the employer's statement, that you spoke to other employees of this policy is accepted. Therefore, your actions rise  
15 to the level of misconduct under the New York State Unemployment Insurance Law.

Camp testified at the hearing on behalf of Respondent, under oath. He initially stated that Gilmore was discharged by both the General Manager and himself. According to Camp, Gilmore requested approval for make-up time from his immediate supervisor, who did not feel  
20 comfortable approving it, so Gilmore brought the request to Camp. At that time, it was Camp's third day in his new managerial position and he was unsure as to how to handle the situation. He consulted with both the Human Resources Manager and the General Manager, who denied Gilmore's request because prior approval had not been received. According to Camp, he delivered the news to Gilmore, but told him, "Let's see what we can work out here." He then  
25 approached the General Manager and explained, "Here is what happened. Yes, he didn't get prior approval but let's review it." Gilmore's request for make up time was again rejected. When this was communicated to Gilmore, he became upset and "voices were raised" so that other people were able to hear. At this point the parties were in Camp's office with an open door. The General Manager overheard the discussion and later asked Camp about it. Camp explained that  
30 Gilmore was unhappy with the determination regarding the make-up time. That, he testified, "was the end of the occurrence." Camp asked the General Manager how she wished to proceed and it was decided that the matter was going to be discussed between the General Manager and the Human Resources Manager. On January 11, Camp was presented with the paperwork for Gilmore's termination.  
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21 Although Respondent conceded at the hearing that this document was copied from DOL files, it argues that there is no evidence as to who prepared the form, and urges that it be given no weight. At the  
40 hearing I accepted it into evidence based upon Abrams' authentication of the document as something reproduced from DOL files, but reserved ruling on what substantive weight it would be afforded. The Board has held that hearsay evidence is admissible if "rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *Dauman Pallet, Inc.*, 314 NLRB 185,186 (1994), quoting *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980). See also *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), enf. denied on other grounds 598 F2d 1267 (2d Cir. 1979). I note that the opening  
45 statements of the administrative law judge conducting the hearing, set forth below, make direct reference to the initial determination regarding Gilmore's claim and that this determination is consistent with and appears to rely upon the results of the investigation as set forth in form TCC-413.2. Moreover, Respondent presented no evidence to refute the fact that Sabow is or was an agent of the Respondent during the relevant period of time. Based upon the foregoing, I conclude that the memorandum accurately represents the information conveyed by an agent of Respondent to the DOL during the course of its  
50 investigation of Gilmore's claim for unemployment insurance benefits.

The administrative law judge continued the questioning as follows:

5 Q: Let me ask a question, All right, if I understand, you know, sort of reading between the lines of what you told me, it seems that whether the work he was doing at home was bonafide or not doesn't seem to be an issue here. It's a matter of whether it was approved or not. In other words, he wasn't out washing his car. He was actually doing the work at home. It's just that he didn't have approval to do it up front. Am I understanding that correctly?

10 A: Correct.

Q: Okay. So, I guess I'm trying to understand - - the initial determination says he is basically causing dissension in the ranks and I'm trying to square that with your testimony that basically he go loud in your office - -

15 A: Uh huh.

Q: - - after this second denial. So, I'm trying to - - let's say, I'm trying to reconcile those two ideas and - -

20 A: Okay, Well, you asked me what occurred - -

Q: Sure

25 A: - - and then what the company is basing their termination cause was the communication that got back that Stephen was going to various people within the organization expressing his displeasure with the companies [sic] policy and this was wave of other policies being instituted that were having employees, I guess, viewing them as negative. So that kind of flamed the fire.

30 Q: I don't know. I mean, why not just say, "Listen. These are the rules. You know, do you [sic] work. You know, if you keep this up, you're going to be - - you're going to be fired. So, just, like, shut up and do your work."

35 A: Okay. I wasn't involved in that decision, Sir.

Q: Had he ever been warned about getting upset and going to other people, you know, other than management before.

40 A: No. As I stated, it was only my third day on the job.

45 Camp then proceeded to testify regarding warnings Gilmore had received in October and November 2004, essentially reading into the record the relevant portions of Gilmore's termination notice relating to those incidents (specifically Gilmore's alleged refusal to stay late to cover West Coast telephone calls, the discussion with Silverman regarding the requirement of flexible hours and the alleged refusal to make a change in a worksheet). Camp made no mention, however, to any discussion that "J.C." had with Gilmore regarding complaints Gilmore was alleged to have made about answering phone calls.

50 Camp was then asked:

Q: Okay. All right. So, do you have any information about these purported discussions

he had with coworkers about this policy in January?

A: The only information I would have is - - is the same information of - - that was reported back to the general manager.

5

Q: And nothing beyond what you have told me at this point?

A: Yes, Sir.

10

Q: Okay. Is there anything else you want to add to your testimony before I ask Mr. Abrams if he has any questions for you?

A: No, Sir.

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During the hearing in the instant case, Camp testified that his memory of the events leading to Gilmore's discharge was better at the time than it had been at the April 2005 unemployment hearing, "because I was able to go back and review timelines and rehash what actually happened. I didn't prepare for the April unemployment hearing."

20

Gilmore then testified. He was initially questioned by Abrams. After establishing preliminary matters, his testimony went as follows:

Q: Okay. Who told you, you were being fired.

25

A: John Camp and Shelly Wang

Q: Okay. Well, the employer says that sometime around January 10<sup>th</sup>, you were going around the company complaining about their policy and creating descent [sic]. What happened?

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A: The policy that I was - - that I was speaking about was that Shelly Wang had -- I believe Shelly Wang had made a new policy that if you were short hours - - short on your forty hours during the week, that if you didn't make that time up, you were either going to have money taken from your pay or you were going to have vacation docked from pay and my understanding was that I was hired under salary and whenever I had been over in my hours I was never compensated for that. So, I didn't understand why I was going to have money or vacation deducted from my pay if I was salaried. The time in question was that I work on a weekend on - - on some documentation that was for a meeting that was Monday morning, that John Camp had had and there was - - there was no way I could have - - this was on Friday. I was - - I was told that this documentation had to be done and there was no way to get it done by Monday other than doing it on the weekend. I was never notified in advance that I needed prior approval to work at home.

40

Gilmore's questioning was then continued by the administrative law judge:

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Q: What did they tell you about why you were getting fired?

A: Shelly Wang presented a document to me that listed several reasons, two of them which are what John Camp mentioned earlier, the warnings and she said that I refused to sign that document and she said that it was actually me signing it was just me agreeing that I was being terminated at that time and at the bottom of the form it said that my signing doesn't mean that I concur with what's on there.

50

Q: Why were they firing you?

A: I believe that it was – it was—they claimed that I was causing dissension in the company about this policy. At the same time, I did speak to my boss about it, Eric Silverman, and I did speak to John Camp about it. Also at the same time, Shelly Wang had started a survey that she handed out in the company, asking all the employees what their opinions were of the company, of the different supervisors, of the different managers.

Q: It's her company, isn't it?

A: Her father owns the company.

Q: Okay

A: Tony Wang

Q: Okay. So let's stop bouncing this one off the wall and let's try, you know, some direct answers to direct questions. What did they tell you about why you were fired?

A: I was causing dissension in the company

Q: Okay. And specifically, what were they unhappy with?

A: They accused me of speaking to other employees about the companies [sic] policy.

Q: About the working at home thing and the prior approval?

A: That was – that was in there also.

Q: I mean, if that was sort of the final incident that got you fired?

A: I believe so.

In response to additional questions from Abrams, Gilmore further testified that he did not, in fact, complain to his coworkers about the make-up time policy, but spoke only with Silverman and Camp.

#### Respondent's Discipline of Other Employees

Shortly after Gilmore was dismissed, Respondent discharged one other employee.<sup>22</sup> As

<sup>22</sup> The evidence adduced in this regard involves only one individual who is fully and clearly identified in the underlying record. The relevant discussion of this individual's employment record includes information contained in her personnel file as well as submissions made to the DOL by Respondent. I find that this individual's identity is of no particular relevance to the issues before me. I am also aware that Board decisions are accessible, and may be searched, through the internet and, therefore, this employee's identity and details about her employment history are easily subject to disclosure to other

Continued

Wang testified, this employee would lose her temper in the office, become abusive to her coworkers and supervisor and would not do what was asked of her. There is no termination notice in the file comparable to one that Wang prepared for Gilmore. In September 2004, the employee received a “verbal” warning (which is set forth in written form in her personnel file).

5 This warning makes general reference to prior occasions of insubordination including spending extensive periods of time engaged in personal conversation with coworkers, contrary to the direction of her superiors. The warning also makes reference to one encounter where the employee “became enraged, and started to yell [at her supervisor].” This supervisor assessed the employee as “unsatisfactory.” At an October 2004 performance evaluation the employee  
10 was rated “meets some expectations.” This individual was discharged on January 28. In response to her application for unemployment insurance benefits, Lasch wrote that the employee’s employment was terminated due to insubordination, tardiness, not adhering to policy, dishonesty, deteriorating workmanship and abuse of company resources. Attached paperwork documented several prior instances where the employee was noted to have  
15 “cursed,” was asked to stop and did not do so.

### III. Analysis and Discussion

20 Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, “employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to  
*engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...*” (emphasis added).

25 The governing standards used in determining whether employees have engaged in concerted activity are set forth in *Myers Industries*, 268 NLRB 493 (1984) (*Myers I*), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *Myers Industries*, 281 NLRB 882 (1986) (*Myers II*), aff’d. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S.  
30 1205 (1988). There, the Board held for an employee’s activity to be concerted within the meaning of the Act, the activity must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee itself. Once it has been determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the activity, the concerted activity is protected under the Act, and the  
35 adverse employment action was motivated by the employee’s concerted protected activity.

40 In addition, the shifting burden analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 393 (1983), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), governs the determination of whether an employer has violated the Act by terminating an employee for his or her concerted protected activity. Under *Wright Line*, the General Counsel bears the burden of proof, by establishing through a preponderance of the evidence, the elements of protected activity, employer knowledge of that activity, adverse employer action and animus against employees’ exercise of protected activity. Once this is established, the burden then shifts to the employer to show that it  
45 would have taken the same action even in the absence of the protected activity. An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the

50 parties wholly unrelated to or with no bona fide interest in this matter. Accordingly, I have decided that under the circumstances it is not necessary to refer to her by name in this decision.

protected conduct. *Wright Line*, supra; *Transportation Management*, supra; *T&J Trucking Co.*, 316 NLRB 771 (1995).<sup>23</sup> Furthermore, if an employer does not assert any business justification other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason. See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

Respondent contends that the General Counsel has failed to establish a prima facie case that Gilmore was discharged in violation of the Act. Specifically, Respondent argues that the General Counsel has failed to meet its threshold burden under *Wright Line* to show that Gilmore engaged in conduct protected under Section 7 of the Act, that Respondent was aware that Gilmore was engaged in protected activity or that there is was any nexus between Gilmore's alleged protected conduct and his discharge. Even if the General Counsel were to make out a prima facie case, it is contended, a preponderance of the evidence establishes that Respondent would have terminated Gilmore even in the absence of any protected conduct. In particular, Respondent asserts that the evidence shows that: Wang decided to terminate Gilmore after his first "tirade" in Camp's office; that even after Wang learned about Gilmore's alleged communications with other employees, she proceeded with plans to give Gilmore only a warning for his insubordination on January 5; that Camp made the decision to discharge Gilmore before learning that he had "discussed his issues" with other employees; and that Gilmore's misconduct was sufficiently "opprobrious and abusive" to warrant his discharge in any event. In so arguing, Respondent argues that I should credit the testimony of Camp and Wang and, conversely, discredit Gilmore as his recollection was unreliable, that his testimony was contradictory and inconsistent and generally unbelievable.

As noted above, Gilmore has consistently admitted that he did not engage in the sort of discussions with coworkers which would be traditionally be protected by the Act. Rather, this case primarily involves the issue of whether Respondent believed he did so. In addition, in her brief, Counsel for the General Counsel further contends that Gilmore was attempting to bring a group complaint to the attention of management, and was thereby engaging in concerted protected activity.

The Board has held that:

[A]ctions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity.

*Monarch Water Systems*, 271 NLRB 558, fn. 3 (1984); Accord: *United States Service Industries, Inc.* 314 NLRB 30 (1994).<sup>24</sup>

In the instant case, I find that Respondent harbored a belief that Gilmore engaged in certain conduct, and that this belief was a motivating factor in the decision to discharge him. As Gilmore's termination notice states, in pertinent part, "he proceeded to make his way around the office discussing his issues with various employees, furthering a negative environment and

<sup>23</sup> However, an employer's defense does not fail simply because not all the evidence supports it, or some evidence tends to refute it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel has the burden of proving discrimination. *Wright Line*, supra, 251 NLRB at 1088, n.11.

<sup>24</sup> See also *NLRB v. Link-Belt Co.*, 311 U.S. 584, 589-90, (1941); *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 840-841 (8<sup>th</sup> Cir. 2003)(and cases cited therein).



wasting valuable time.” Moreover, the undisputed evidence establishes that in its dealings with an investigator from the New York State Department of Labor, Respondent took the unambiguous position that Gilmore was discharged solely “because the claimant went around the office, to some of the other employees, on 1/5/2005, discussing his dissatisfaction with the company’s policy about not being granted authorization to make up time at home.” This was echoed by Camp, who in sworn testimony at Gilmore’s unemployment hearing testified that, Respondent based its termination of Gilmore on, “the communication that got back that Stephen was going to various people within the organization expressing his displeasure with the companies [sic] policy and this was wave of other policies being instituted that were having employees, I guess, viewing them as negative. So that kind of flamed the fire.”

I further find that the behavior which was attributed to Gilmore by Respondent is conduct that is protected by the Act. Respondent’s make-up time policy implicates two areas of particular concern to employees: wages and scheduling.

As an initial matter, wages are considered a vital term and condition of employment and, accordingly, the Board has consistently held that the right of employees to discuss among themselves their wages and other forms of compensation is inherently concerted activity. *Triana Industries*, 245 NLRB 1258 (1979); *Scientific-Atlantica*, 278 NLRB 622 (1986); *Automatic Screw Products Co.*, 306 NLRB 1072 (1992). This right exists even in circumstances where an employer believes that such discussions are divisive of the workplace or will have a negative impact on employee morale. *Scientifica-Atlantica*, supra at 625.

In *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied on other grounds, 81 F.3d 209 (D.C. Cir. 1996), the Board, reversing the administrative law judge, found that employee discussions about schedule changes was also conduct protected by Section 7 of the Act. In that instance, the judge had concluded that the discussions were not concerted as there was no suggestion that they had the object of initiating group action. In reversing the judge, the Board first discussed those cases which had found that discussion of wages among employees is protected conduct, because wages are a “vital term and condition of employment,” “probably the most critical element in employment,” and “the grist on which concerted activity feeds” (footnotes and internal citations omitted.) The Board went on to state:

Changes in work schedules involve when and where employees will work. They are directly linked to hours and conditions of work – both vital elements of employment –and are as likely to spawn collective action as the discussion of wages. *Id.*

Moreover, Gilmore’s un rebutted testimony is that employees had previously indicated their dissatisfaction with Respondent’s make-up time policy by their responses to Wang’s questionnaire. Wang also admitted that she knew that Holmes had been actively speaking with employees regarding her dissatisfaction with Respondent’s policies. Thus, I conclude that Respondent was aware that its make-up time policy was a term and condition of employment that was the subject of consternation and discussion among employees. See *Aroostook County Regional Ophthalmology Center*, supra (discussions found to constitute protected conduct where, among other things, employees had previously identified schedule changes as an important issue concerning their working conditions).

Based upon the foregoing, I conclude that the conduct that Gilmore was believed to

have engaged in falls squarely within the purview of the Act.<sup>25</sup>

Applying the foregoing principles here in the context of a *Wright Line* analysis, I find that the General Counsel has shown that Respondent's erroneous belief that Gilmore engaged in concerted protected activity was a motivating factor in its decision to discharge him. I credit Gilmore's testimony that at the time of his discharge he was told that he was being let go for causing dissension in the ranks. I note, as Respondent argues, that this assertion is not contained in Gilmore's pre-hearing affidavit. However, on balance, I find that this is not a sufficient basis to discredit him on this issue. Generally, I found that Gilmore, whose recollection was admittedly faulty in certain respects, nevertheless attempted to testify in a forthright and truthful manner.<sup>26</sup> Moreover, I note that Gilmore had previously given consistent testimony at his unemployment hearing. As Gilmore's application had initially been rejected due to the fact that it had been determined that such conduct (i.e. causing dissention in the ranks) amounted to disqualifying misconduct, his testimony to such effect at the unemployment hearing could quite possibly have been adverse to his interests.<sup>27</sup> This, in my view, enhances the inherent probability that he was being truthful on this issue and I credit his explanation for why he omitted this fact from his affidavit. I additionally note that neither Wang nor Camp specifically denied that such a statement was made. In any event, even if I were not to credit Gilmore on this point, General Counsel has adduced admissions that this belief was a motivating factor in Gilmore's discharge, not only through the contents of Gilmore's termination notice but by the information provided to the New York State Department of Labor and Camp's sworn testimony at Gilmore's unemployment hearing.

I further find, based upon the weight of the credible evidence, and bearing in mind the respective burdens of proof of the parties, that Respondent has not shown that it would have

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<sup>25</sup> Relying on *Phillips Petroleum Company*, 339 NLRB 916, 918 (2003), Counsel for the General Counsel argues, in the alternative, that Gilmore engaged in concerted conduct by bringing to the attention of management a policy change that was upsetting to many employees. In the case cited by the General Counsel, an employee was discharged after attempting to obtain changes to the company's family medical leave policy. In finding the discharge unlawful, the Board noted that the employee's efforts "originated because of his need to care for his wife and children," but found that they also "embraced the larger purpose of obtaining this benefit for all of his fellow employees." It held that concerted activity occurred "when an individual attempts to bring a group complaint to the attention of management." The record herein establishes that although Gilmore told his superiors that he was unhappy with Respondent's make-up time policy, there is no evidence that he was either acting in conjunction with or on the authority of other employees when doing so. Unlike the discriminatee in *Phillips Petroleum*, supra, Gilmore did not discuss his concerns with other employees, neither was he urged by coworkers to bring these matters to his employer's attention. Moreover, Gilmore was not advancing a group complaint. Rather, his stated dissatisfaction concerned only his personal circumstances. See e.g. *K-Mart Corp.*, 341 NLRB 702, 703 (2004) (citing *Myers I* and *Myers II*) ("To the extent that the General Counsel is arguing that [an individual employee's] protest, even if not authorized by other employees, would be protected as an expression of the unit employees' common concerns, we find it contrary to controlling Board precedent.") I conclude therefore, that Gilmore's statements to management regarding his dissatisfaction with Respondent's make-up time policy, or the way in which it was implemented, is not concerted activity as such has been defined by the Board.

<sup>26</sup> In its brief, Respondent cites numerous instances where Gilmore is alleged to have provided inconsistent or unreliable testimony. I have carefully reviewed the transcript references and have concluded that, to the extent Respondent is correct, the apparent inconsistencies stem primarily from a failure of memory or a misapprehension regarding what was being asked.

<sup>27</sup> The determination of the administrative law judge was not entered into the record.

discharged Gilmore irregardless of its belief that he engaged in concerted protected activity.

Since Gilmore's discharge in January 2005, Respondent has at various times, in differing forums, proffered varying reasons for its decision to terminate his employment ranging from causing dissension in the workplace to opprobrious insubordination and inadequate job performance. As an initial matter, I do not credit the testimony of Camp and Wang, adduced at the hearing before me, regarding the nature and extent of Gilmore's alleged insubordination. While their accounts were detailed and generally mutually corroborative, they were implausible in various respects, and not corroborated by other record evidence in significant regard.

The underlying rationale for Respondent's proffered defense, that Gilmore became enraged and insubordinate when his request for make-up time was rejected, is seriously called into question by the fact that his make-up time request form was actually signed by both Silverman and Camp. This tends to support Gilmore's testimony that after he initially went to see Camp because Silverman was unavailable, Camp took the form from him and told him he would take care of it. If Camp did not intend to approve the time, in whole or in part, there is no apparent reason for him to have signed the form which claimed a full five hours, or have it signed by Silverman. The presence of these signatures on the request form also tends to refute Respondent's assertions that Gilmore was never presented with a deadline for doing the assigned work or that his request for make-up time was viewed as excessive.<sup>28</sup> I note that at Gilmore's unemployment hearing Camp concurred, in response to a specific inquiry from the administrative law judge, that Gilmore's work at home was bona fide. Moreover, there is no reference to any alleged false claim for make-up time in Gilmore's termination notice. Respondent has offered no evidence to explain why Camp and Silverman's signatures appear on Gilmore's make-up time form. This failure, together with Camp's testimony at the unemployment hearing in conjunction with an absence of any reference to this issue in Gilmore's termination notice, raises serious doubt about the fundamental veracity of Respondent's defense.<sup>29</sup>

With respect to Gilmore's misconduct in Camp's office on June 5, Respondent cites Gilmore's alleged use of profanity in arguing that he engaged in an offense worthy of discharge. Yet, Gilmore's termination notice, which states that Gilmore was "yelling and shouting," fails to document any use of vulgar or otherwise inappropriate language. I find this noteworthy, inasmuch as Wang testified that Camp discussed this incident with her shortly after it occurred and specifically told her that Gilmore had been cursing at him. Wang even offered testimony to the effect that she informed Camp that such language was unacceptable in her "family oriented" workplace. Again, I find the omission of this salient detail from Wang's narrative description of Gilmore's ostensible misconduct to be significant.

As to the issue of whether Gilmore engaged in any further acts of insubordination, I note that there is no mention of any subsequent misconduct in the termination notice, in particular

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<sup>28</sup> In the unemployment hearing, Camp testified that Gilmore's request was not granted because he had not received prior approval. In the instant case, Respondent contends that the request was refused both because Gilmore had not received prior approval from a supervisor and because it was believed that the amount of time Gilmore was claiming was excessive.

<sup>29</sup> I further note that Respondent appears to acknowledge that Gilmore's pay was not reduced. Although Wang testified that a salaried employee would not lose pay unless a full day was missed, this explanation fails to account for the fact that Lasch asked Gilmore to complete the form for a five-hour absence in the first instance.

there is no reference to what is alleged to have occurred on January 7. Although Wang stated that this omission was due to the fact that she did not learn of any additional misconduct until after she had written the narrative contained in the termination notice, I find this explanation to be unavailing. It is highly implausible that Camp would not have had any opportunity to tell Wang about any subsequent incidents of insubordination prior to their meeting during the late-morning of January 10<sup>th</sup>, (even with the intervening weekend), since his office was situated next to hers. Although Camp testified that he told Wang that he had not had the opportunity to speak with her before that time, Respondent failed to present probative evidence or any plausible explanation as to why this would not have been possible.<sup>30</sup> Moreover, I do not believe that Camp, as a new manager, would have waited several days to communicate this information to Wang, particularly since he presumably still owed her a written report regarding his interaction with Gilmore on January 5 and a final decision had not been made as to the extent of the discipline to be meted out. Finally, if Gilmore had been loud enough to draw a crowd on this second occasion, as Camp testified, it stands to reason that Wang would have overheard this outburst, as she had previously. There is no explanation of why she did not. Thus, I do not credit Respondent's witnesses regarding a second incident of insubordination on January 7. However, even if I were to conclude that there was a second incident which occurred on that date, the fact that Camp waited until the 10<sup>th</sup> to discuss it with Wang suggests it was viewed as trivial at the time.

In general, I found Camp's testimony about his encounters with Gilmore to have a hollow ring. Moreover, it is inconsistent in significant regard with his prior sworn testimony. Respondent, in its brief, argues that that Camp's testimony at the unemployment hearing is corroborative of the account he gave in the instant case. To a certain, limited, extent that is true. In particular, as Respondent notes, Camp testified at the unemployment hearing about the denial of Gilmore's request for make-up time and a second incident where "voices were raised." Although Camp did not specify the date, Respondent argues that it is apparent that this took place on January 7. Respondent further notes that Camp's testimony that he received the paperwork regarding Gilmore's termination on January 11<sup>th</sup> is consistent with his testimony at the unfair labor practice hearing.

Nevertheless, I find that it is the palpable discrepancy between Camp's testimony at the unemployment hearing and in the instant case which goes to the heart of the matter.<sup>31</sup> Even if I were to credit Camp's assertion that he failed to prepare for the April unemployment hearing, which I do not, I find that it is simply beyond belief that under the circumstances Camp would not have remembered, and reported, Gilmore's alleged repeated use of profanity and belligerent conduct at that time. After all, it was Camp himself, and not any other manager, who was directly involved in the alleged confrontations with Gilmore. Moreover, according to his

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<sup>30</sup> In its brief, Respondent asserts that the earliest Camp could speak with Wang regarding the January 7 incident was during the late morning on Monday, January 10. Respondent asserts that on January 7 Wang was "unavailable" and that both Wang and Camp were involved in a training class much of the day on the 10<sup>th</sup>. There is no record evidence as to Wang's "unavailability" on January 7<sup>th</sup>. Wang testified only that "we were pretty busy with meetings" on the 10<sup>th</sup>, and she spoke with Camp during a break. The only reference to "training" was adduced through a leading question posed to Camp by counsel for Respondent to Camp, who responded that he met with Wang during a break on the 10<sup>th</sup>. In my view, this evidence is insufficient to establish that there had been no opportunity for Camp to consult with Wang prior to the preparation of the termination notice.

<sup>31</sup> I reject Respondent's contention that these disparities stemmed from Camp's confusion regarding the "timeline" of events.

testimony at the instant hearing, Camp was the person who made the determination that Gilmore should be discharged because of this egregious behavior. Camp also readily testified to his discomfort stemming from the fact that Gilmore's misconduct was subject to public display. I find that this would have been something not easily overlooked or forgotten, especially in light of the fact that the unemployment hearing took place only a few months after the events in question. I also note that at the close of his testimony in the unemployment hearing, Camp was specifically asked whether he wished to add anything to his testimony, and stated that he did not. If, in fact, Gilmore had engaged in profanity-laced belligerent tirades, as alleged, I find it likely that such matters would have been raised with the administrative law judge. I further presume that Camp, as a relatively new managerial employee, would have taken his appearance at the unemployment hearing seriously, and would not have gone unprepared. There is simply no credible explanation of why Camp did not make reference to the full measure of Gilmore's purported insubordination on this occasion, except, of course, that it is of recent invention.

As noted above, in addition to describing Gilmore's concerted activity, the termination notice makes reference several other alleged deficiencies in his performance. In its brief, Respondent refers to these matters, but does not specifically advance the argument that, absent Gilmore's misconduct on January 5 and 7, any of these other incidents would, singly or in the aggregate, form a separate basis for his discharge.<sup>32</sup> In any event, I concur with the General Counsel that Respondent has failed to show that the other shortcomings detailed in the termination notice would have resulted in Gilmore's termination. The credible record evidence shows, to the contrary, that most of these other incidents of purported misconduct were either significantly exaggerated, or simply did not exist at the time.

In this regard, I note that Gilmore's November personnel evaluation showed that he was an employee who either met or exceeded expectations and contained a number of favorable comments regarding his abilities and initiative. His personnel file did not contain any prior warnings or disciplinary notices. As Counsel for the General Counsel observes, the negative remarks cited by Wang were based upon comments which had been made in an overall favorable context. Moreover, to the extent Respondent attempts to rely upon any of these cited deficiencies in rebutting the General Counsel's prima facie case, or in challenging Gilmore's credibility, I find it significant that Silverman, who worked with and supervised Gilmore for the full term of his employment, evaluated him on two occasions and was directly involved in virtually all the matters cited by Wang was not called to testify. I conclude that the unexplained failure to call Silverman gives rise to an inference that if he had testified truthfully regarding these the events in question, such testimony would have not been favorable to the Respondent. *GATX Logistics*, 323 NLRB 328, 331 fn. 9 (1997); *Asarco, Inc.*, 316 NLRB 636, 640 (1995). With regard to Gilmore's alleged misrepresentation of his prior salary, notes taken at his employment interview show that he informed Respondent of the periodic 10% reduction in his rate of pay. Since Wang and Camp both testified that they gave Gilmore's personnel file a comprehensive review, this would have been apparent to them.

Gilmore's termination notice additionally accuses him of "disturb[ing] the workplace", "furthering a negative environment" and "wasting valuable time. Wang, testifying to this issue, stated that these comments were based upon Silverman's report that Gilmore had stormed back to the office and complained that Respondent's time policies were "bullshit." Respondent has

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<sup>32</sup> Respondent's contention that Gilmore's conduct on January 5 was sufficient in and of itself to warrant his discharge is discussed below.

presented no other evidence in support of its asserted belief that Gilmore was being disruptive to the workplace or was otherwise wasting time. Based upon the record as a whole, therefore, I conclude that the negative comments and characterization of Gilmore's conduct in the termination notice are primarily attributable to Wang's belief that Gilmore was making unfavorable comments about Respondent's wage and hour policies to his fellow employees, and are a reflection of her animus toward that conduct.<sup>33</sup>

Respondent further argues that Gilmore's conduct on January 5, standing alone, was sufficient to cause Wang to determine that he should be discharged.<sup>34</sup> In support of this contention, Respondent relies upon Gilmore's admission that in a meeting with Camp the following day he was told that Wang was upset for him for raising his voice and that "it really doesn't look good for you." As discussed above, I find that Respondent's characterization of Gilmore's conduct on January 5 is not supported by the record as a whole, including my assessment of the credibility of the witnesses. I note, moreover, that at the unemployment hearing, Camp's description of his first encounter with Gilmore fails to make reference to any act of insubordination. Moreover, Camp testified that the fact that Gilmore "went loud" in his office was not, in fact, the reason for his discharge.<sup>35</sup> Rather, Camp stated that the motivating factor was "the communication that got back that Stephen was going to various people within the organization expressing his displeasure with the companies [sic] policy." It appears, therefore, that Wang's displeasure stemmed primarily from those communications. While I find that Gilmore was upset and spoke in a loud and possibly inappropriate manner on this occasion, I conclude that Respondent has failed to sustain its burden to prove, by a preponderance of the evidence, that it would have discharged Gilmore solely on the basis of his conduct in Camp's office on January 5, whether or not it believed that he had engaged in conduct protected by the Act.<sup>36</sup>

Thus, I find that Respondent's decision to discharge Gilmore was made because Respondent believed that he had "caused dissension in the ranks" (or as Camp put it "flamed the fire") by voicing his complaints to his coworkers regarding Respondent's make-up time policy, and not as a result of, as Respondent asserts in its brief, "two profanity-laced, belligerent tirades directed at Camp, both of which were overheard by other employees, including the second highest ranking employee in the Company." Moreover, for the reasons discussed above, I do not find that Gilmore engaged in any conduct which would cause him to lose the protections of Section 7 of the Act, or that Respondent has advanced a credible neutral business justification sufficient to meet its burden to show that it would have discharged Gilmore absent

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<sup>33</sup> I further conclude that Respondent has not shown that the conduct that Gilmore was believed to have engaged in was so egregious as to support a finding that it would have lost the protection of the Act if, in fact, it had occurred. The Board has long held that in the context of engaging in concerted protected activity, "a certain degree of leeway is allowed in terms of the manner in which [employees] conduct themselves" and that "impropriety alone does not strip concerted conduct of statutory protection." *Aroostook County Regional Ophthalmology Center*, supra at 220 (and cases cited therein).

<sup>34</sup> As discussed above, I have found that Gilmore's conduct on this occasion did not rise to the level of concerted protected activity.

<sup>35</sup> I additionally note that this factor was not mentioned to the Department of Labor during its initial investigation; nor did Camp testify that he made such a comment to Gilmore in the instant hearing.

<sup>36</sup> Further, there is some record evidence, which is essentially un rebutted and unexplained, that Respondent tolerated repeated instances of at least equally egregious behavior (including the repeated use of profanity and numerous instances of insubordination) before terminating another employee at about this same period of time.

his concerted protected activity. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act, as alleged in the complaint.

### Conclusions of Law

1. By discharging Stephen P. Gilmore because of its belief that he discussed Respondent's policies regarding wages, hours and other terms and conditions of employment with Respondent's other employees Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. Respondent has not violated the Act as otherwise alleged in the complaint.

### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Gilmore, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>37</sup>

### ORDER

The Respondent, Wangs Alliance Corporation, its officers, agents, and representatives shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of Respondent's belief that they have engaged in concerted protected conduct.

(b) In any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Stephen P. Gilmore full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privilege previously enjoyed.

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<sup>37</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Stephen P. Gilmore whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Gilmore in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Garden City, New York, copies of the attached notice marked "Appendix."<sup>38</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 11, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

\_\_\_\_\_  
Mindy E. Landow  
Administrative Law Judge

<sup>38</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you because of our belief that you have engaged in concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Stephen Gilmore full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Stephen P. Gilmore whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Stephen P. Gilmore and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.